At the same term, to wit, April 10, 1933, said cause came on to be heard on the aforementioned motion to dismiss, the Honorable James A. Lowell, District Judge, sitting, and on the fourteenth day of said April a memorandum of the court was announced, granting motion to dismiss.

[fol. 5] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION THAT FULL COSTS AND COUNSEL FEE BE ALLOWED—Filed April 17, 1933

Now come the respondents and, after the granting of the motion to dismiss the bill, move the court that full costs and counsel fee be allowed to each respondent in accordance with Section 40 of the Copyright Act.

By their Attorneys, Elder, Whitman, Weyburn & Crocker.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR LEAVE TO AMEND BILL—Filed April 18, 1933

Now comes William A. S. Douglas, plaintiff in the above-entitled case, and moves this court for leave to file an amended bill of complaint, amended by adding The American Mercury, Inc. as a party plaintiff, and in other respects, and requiring no further answer from the said defendant, a copy of said amended bill being attached hereto.

The original bill has been amended as follows:

1. By adding The American Mercury, Inc. as a party plaintiff and in the title of this case.

2. By changing the word "plaintiff" to "plaintiffs" throughout, and specifying the plaintiff W. A. S. Douglas and the plaintiff The American Mercury, Inc., where necessary, as appears in said amended bill.

3. The words on page 4 [printed page 8], line 2, paragraph 6, "annexed hereto as Exhibit A" are omitted and

there is substituted therefor "ready to be produced in court if required."

4. The words on page 6 [printed page 10,] line 6 of paragraph 11, "not only permanently but temporarily [fol. 6] pending this suit" are omitted.

5. The words on page 6 [printed page 10], paragraph 2, lines 1 and 2 of the prayer for relief, "an injunction issue preliminary until final hearing therein and perpetual thereafter" are omitted, and there is substituted therefor "a perpetual injunction issued" as appeared on page 6 [printed page 10] of the amended bill.

By his Attorneys, MacLeod, Calver, Copeland & Dike. George P. Dike, Cedric W. Porter, of Counsel.

IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

The plaintiff, William A. S. Douglas, a citizen of the United States and residing at 1413 Tower Road, City of Winnetka, County of Cook, State of Illinois, and the plaintiff The American Mercury, Inc., a corporation duly organized and existing under the laws of the State of New York and having a principal place of business at 730 Fifth Avenue, City, County and State of New York, present this their bill of complaint against the defendant, Elijah William Cunningham, residing at 42 Sheffield Road, City of Newton, County of Middlesex, and State of Massachusetts, and against the defendant Post Publishing Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and having a regular and established place of business at 259 Washington Street, Boston, County of Suffolk, and State of Massachusetts.

And thereupon the plaintiffs complain and say:

(1) This is a suit in equity arising under the copyright laws of the United States. The defendant Elijah William Cunningham is an inhabitant of the State of Massachusetts and the defendant Post Publishing Company is a corpora-

tion organized and existing under the laws of the State of [fol. 7] Massachusetts and has a regular and established place of business within the District of Massachusetts, and upon these facts the court's jurisdiction depends.

(2) That heretofore and prior to February 25, 1928, the plaintiff W. A. S. Douglas, a citizen of the United States, and by profession a newspaperman and author, wrote and composed a certain original literary work in the form of a short story based on fictional incidents and entitled "Klu Klux"; and that during the times hereinafter mentioned the plaintiff The American Mercury, Inc., was and now is a corporation organized under the laws of the State of New York, and during the year 1928 was engaged in the publishing business in the City of New York, County and State of New York, and was the proprietor and publisher of a certain periodical published each month at said City of New York entitled and known as The American Mercury, which said periodical was composed of stories, novels, poems, essays, criticisms and other literary compositions, and the periodical numbers of the same were, as plaintiffs are informed and believe, duly entered for and protected by copyright under the laws of the United States.

(3) That heretofore and prior to February 25, 1928, the said William A. S. Douglas did, for a valuable consideration to him then paid by the said The American Mercury, Inc., sell and assign to said The American Mercury, Inc. the said story entitled "Klu Klux".

(4) That said literary work of the plaintiff W. A. S. Douglas was thereafter published in print on or about the twenty-fifth day of February, 1928 under the title of "Klu Klux" in and as part of Volume XIII, No. 51, of The American Mercury for March, 1928, by the said The American Mercury, Inc. at the said City of New York; that when so published said work had affixed to its title page notice of copyright in words and figures as follows, to wit: "Copyright, 1928, by The American Mercury, Inc."; and as plaintiffs are informed and believe that said notice has been affixed to the title page of each and every volume sold, published and/or publicly distributed by and under the authority of the plaintiff The American Mercury, Inc.

[fol. 8] (5) That the said number of the American Mercury for March, 1928, was a volume of about 383 pages and

consisted of the plaintiff W. A. S. Douglas' said literary work entitled "Klu Klux", therein, published on pages 272 to 279 inclusive, and other literary compositions.

(6) And the plaintiffs further say, on information and belief, that said The American Mercury, Inc. on the twenty-third day of February, 1928 and immediately before the first publication thereof, as aforesaid, deposited or caused to be deposited in the mail, addressed to the Register of Copyrights, Washington, D. C., two complete copies of the best edition of said work then published, together with a written claim of copyright therein, and an affidavit showing that said work was printed in the United States, from type set within the limits of the United States, that the same was bound within the United States, and that the making of the plates and engraving, photo-engraving, text and everything embodied in said publication were all performed within the limits of the United States, and has paid the fees prescribed by law; that the said Register of Copyrights duly issued to The American Mercury, Inc., under the seal of the Library of Congress, Copyright Office of the United States of America, a certificate of copyright registration signed by the Register of Copyrights, dated and identified as follows: "February 23, 1928, Class B, XXc No. 767,826", a certification of which registration is ready to be produced in court if required.

(7) That by reason of the premises, the said The American Mercury, Inc. acquired the sole liberty and exclusive right of printing, reprinting, publishing, copying, vending, dramatizing and translating in whole and in part the said No. 51, Vol. XIII, of The American Mercury for March, 1928, consisting in part of said literary work of the plaintiff W. A. S. Douglas entitled "Klu Klux", for a term of twenty-eight years from the twenty-fifth day of February, 1928.

(8) The plaintiffs further say that on or about the ninth day of March, 1928, by a certain instrument in writing, the said The American Mercury, Inc. assigned, set over, trans-[fol. 9] ferred and conveyed to the plaintiff W. A. S. Douglas for a good and sufficient consideration the copyrights registered in the office of the Register of Copyrights in the United States of America to and in the literary work written by the plaintiff W. A. S. Douglas entitled "Klu Klux", the original of which written assignment is ready to be pro-

duced in court if required; that the plaintiff W. A. S. Douglas herein now is the sole owner and proprietor of the said literary work entitled "Klu Klux" and of the copyright thereof and of all rights therein and therefrom arising.

(9) That thereafter the plaintiff W. A. S. Douglas caused the said literary work "Klu Klux" to be reproduced in the form of a dramatic composition, which now awaits production upon the stage, and has been offered large sums for the motion picture photoplay rights in and to the said literary work, and has been offered publication of said literary work in a book of short stories when sufficient other short stories shall have been written by the plaintiff W. A. S. Douglas and that the copyrights in said literary work are extremely valuable to the plaintiff W. A. S. Douglas.

10. The plaintiffs further say that subsequent to the twenty-fifth day of February, 1928, and before the commencement of this action, that the defendant Elijah William Cunningham, well knowing the premises and the rights and privileges of the plaintiff W. A. S. Douglas and contriving to injure him and deprive him of the business and profits which would otherwise have accrued from the ownership of said copyrights and exclusive rights and privileges therein, and without the consent and against the will of the plaintiff W. A. S. Douglas, and in infringement of the said copyright and in violation of the rights of the plaintiff W. A. S. Douglas in his said original literary work entitled "Klu Klux", prepared and caused to be printed a short story which contains the entire plot and the dramatic situations arranged in the same order and sequence, all of the characters and nearly all of the incidents and ideas invented, devised, composed and written by the plaintiff W. A. S. Douglas in his said original literary work or short story entitled "Klu Klux"; that the said short story copied and recomposed and arranged by the said defendant [fol. 10] Elijah William Cunningham was published and featured as if it were a news article by the defendant Post Publishing Company, in its issue of the Boston Sunday Post of August 30, 1931, under the heading "Klan Killed Hero of War", with the words "By Bill Cunningham" thereunder, on page 1 and continued to page 5 of said issue, a copy of which is annexed hereto and made a part hereof as Exhibit C.

(11) That but for the wrongful acts and conduct of the defendants herein complained of plaintiff W. A. S. Douglas would now be in exclusive enjoyment of his aforesaid rights to reproduce and exhibit said copyrighted work and would have enjoyed large business and profits therefrom but by reason of such unlawful acts and conduct of defendants, plaintiff W. A. S. Douglas has been prevented and hindered from enjoying such business and profits and is threatened with great and irreparable damage unless the infringing and unlawful acts complained of shall be restrained, enjoined and prevented by an order from the court to that effect.

(12) For as much as the plaintiff can not have adequate and complete relief except in a court of equity and in this court, plaintiffs pray:

1. That there be issued out of and under the seal of this court a subpœna ad respondendum directed to said defendants commanding them on a day certain to appear and make answer to the bill of complaint, and to abide and conform to such court order and decree which hereinafter may be made.

2. That a perpetual injunction issue enjoining and restraining the said defendants, Elijah William Cunningham and Post Publishing Company, and each of their officers, clerks, attorneys, agents, servants and employees and all other persons acting under their authority or direction, jointly or severally, and each and every one of them and all in privy with them from directly or indirectly printing, selling or using in printed publications, or otherwise disposing of any copies of said publications or parts thereof and from further publishing or selling or exposing for sale or using in printed form any printed matter which shall infringe in any respect said copyrighted work of the plain-
[fol. 11] tiffs and from using, reproducing, imitating, copying or simulating in any way whatsoever any of the original matter contained in the said copyrighted work written and owned by the plaintiffs.

3. That the defendants shall make full, true, direct and personal answer, but not under oath, an answer under oath being hereby specifically waived, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and charged as

fully and particularly as if the same were here repeated paragraph by paragraph and defendants specially interrogated thereto.

4. That the said defendants be compelled by an order of this Honorable Court to account for all such infringing reproduction of said literary work of the plaintiffs in whatsoever form possessed by the defendants or at any time in their possession and to account for and pay over to the plaintiffs all such gains and profits as plaintiff would have received but for such wrongful acts and conduct of the said defendants and all damages plaintiffs have sustained thereby, or, in lieu of actual damages or profits, such damages as to this court shall appear to be just and proper within the provisions of the act of Congress in such cases made and provided.

5. That the defendants pay to the plaintiffs all reasonable costs and charges of this suit, as well as a reasonable counsel fee, and that the plaintiffs may have such other and further relief as to the court may seem meet herein and conformable to the course and principles of equity.

William A. S. Douglas and The American Mercury Inc., by their Attorneys, Macleod, Calver, Copeland & Dike. Of Counsel: George P. Dike, Cedric W. Porter.

[Memorandum.—Copy of Exhibit C, a story published in the Boston Sunday Post, and referred to as annexed, is here omitted. James S. Allen, Clerk.]

[fol. 12] Also at the same term, to wit, April 18, 1933, said cause was set down for hearing on the motion that full costs and counsel fee be allowed, etc. and on plaintiff's motion for leave to file amended bill of complaint, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence continued under advisement to May 16, 1933, when a memorandum of court was announced allowing plaintiff's motion to amend bill of complaint and denying defendant's motion for costs.

This cause was thence continued from term to term to the September Term, A. D. 1933, when, to wit, November

10, 1933, said cause was set down for hearing on the pleadings and evidence, the Honorable James A. Lowell, District Judge, sitting.

This cause was thence continued under advisement to the present December Term, A. D. 1933, when, to wit, December 14, 1933, a memorandum of the court is announced, a decree to be entered in favor of the plaintiff.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—January 2, 1934

This cause having come on to be heard upon pleadings and after trial in open court and having considered the arguments and briefs of Cedric W. Porter, Esquire, for the plaintiffs and Edmund A. Whitman, Esquire, for the defendants, it is

Ordered, adjudged and decreed:

1. That William A. S. Douglas is the author of a certain short story entitled "Klu Klux," that copyright of said story was duly obtained by publication of said story with the statutory notice of copyright and the filing of two copies of said story in the Library of Congress, for which a certificate of copyright registration was duly issued dated February 23, 1928, Class B, XXc, No. 767,828; that said copyright is good and valid in law and is owned by the plaintiffs.

2. That the defendants, Elijah William Cunningham and [fol. 13] Post Publishing Company, have infringed and violated the said copyright and the exclusive rights of said plaintiffs.

3. That a writ of injunction be issued out of and under the seal of this court perpetually restraining and enjoining the said defendants, Elijah William Cunningham and Post Publishing Company, and each of their officers, clerks, attorneys, agents, servants and employees and all other persons acting under their authority or direction, jointly or severally, and each and every one of them and all in privy with them from directly or indirectly printing, selling or using in printed publications, or otherwise disposing of any copies of said publications or parts thereof and from fur-

ther publishing or selling or exposing for sale or using in printed form any printed matter which shall infringe in any respect said copyrighted work of the plaintiffs and from using, reproducing, imitating, copying or simulating in any way whatsoever any of the original matter contained in the said copyrighted work Klu Klux written and owned by the plaintiffs.

4. That the plaintiffs recover of the defendants, Elijah William Cunningham and Post Publishing Company, in lieu of actual damages or profits, the sum of five thousand dollars ($5,000), and in addition a reasonable attorney's fee of fifteen hundred dollars ($1,500).

Elisha H. Brewster, United States District Judge.

Claim of Appeal and Allowance Thereof

From the foregoing final decree, the defendants claimed an *au* appeal to the United States Circuit Court of Appeals for the First Circuit on the ninth day of January, A. D. 1934, which appeal was allowed by the court on January 10, 1934.

In United States District Court

Memorandum on Motion to Dismiss—April 14, 1933

Lowell, J.:

The complainant brought a bill in equity for infringement of a copyright, in which he alleged that he had composed a short story, Klu Klux, which he had sold to the American Mercury Magazine. This was published by the [fol. 14] American Mercury Magazine, together with many other stories and articles, in its issues of March 1928, which was sent out on February 25, 1928. The American Mercury Magazine took out the copyright by depositing this issue in Washington on February 23, 1928. The bill further alleged that in March, 1928, the American Mercury Magazine assigned in writing to the complainant all its rights to the short story Klu Klux.

The respondents filed a motion to dismiss. It gave several reasons for this motion, one of which was that it ap-

peared from the bill of complaint that the complainant was not the owner of the copyright as the entire copyright in the issue of March, 1928, was not assigned to him, but that he had merely been given the rights in one part of it which related to the story Klu Klux. This at most constituted him a licensee. In my opinion the point is well taken. New Fiction Publishing Co. v. Star Company, 220 F. 994.

In the case of Witwer v. Harold Lloyd Corporation, 46 F. (2d) 792, cited by the complainant, it is not clear from the report whether the story was copyrighted alone or as part of an issue of the Popular Magazine. But it appears that the whole copyright (whichever it was) was assigned to the plaintiff. That case therefore is distinguishable from the present one.

Motion granted.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—December 14, 1933

BREWSTER, J.:

This cause was before the late Judge Lowell for hearing upon the merits. It is a copyright suit where the infringement of a copyrighted article in the American Mercury is admitted. The only question presented related to the amount of damages and the attorney's fees. After hearing testimony and arguments of counsel, the following statement was made by the court:

"Mr. Clerk, you may make the entry, '$5,000 plus $1,500 attorney's fee, to be suspended on the question of law to be argued later by the parties.' "

The court added that the Post Publishing Company had published the article as news in an issue which had gone to [fol. 15] over 300,000 subscribers or buyers and that it was perfectly clear to him that the infringement was more than the statutory sum of $5,000.

Before the briefs had been filed, or at least considered by Judge Lowell, his death occurred, and the parties have agreed that the case may be now disposed of upon the record and the briefs filed by the parties.

As I read the record, Judge Lowell determined the amount of the damages and the amount of the reasonable

attorney's fee which the plaintiff is entitled to recover. This determination must stand unless it must be held that the award was unauthorized by 17 U. S. C. A. 25 and 40, the statute under which the suit was instituted. I do not deem it to be within my province to decide whether there has been an abuse of the discretion which the act gives to the court respecting a just award of damages or reasonable attorney's fee, and clearly I cannot pass judgment upon the justice of an award made by another judge of this court. Any party aggrieved by Judge Lowell's action has his remedy by appeal.

I am satisfied that the statute authorized the entry of an order for the decree of $5,000 damages and $1,500 attorney's fee. The applicable provisions of Section 25 are as follows:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . 'To pay to the copyright proprietor . . . in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but . . . such damages shall in no . . . case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . .

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"

Plaintiff's work came within those enumerated in Section 5.

Obviously Judge Lowell adopted the alternative in fixing [fol. 16] damages, as was clearly his right if he thought the facts warranted, of allowing the plaintiff to recover $1 for every infringing copy sold by the defendant publishing company, and inasmuch as the total number of these copies exceeded 300,000 the maximum limitation necessarily was applied.

I find nothing in the defendant's brief or in the cases cited to support the proposition that the copyright laws are inadequate to sustain the award. It is not enough in the

situation presented by the record to show how other courts have applied the statute or exercised the discretionary power conferred by it.

I do not find that the courts have ever interpreted the statute to mean that where no actual damages were proved the court, in awarding an amount in lieu of actual damages, is limited to the minimum of $250, but if the court is to be thus limited the record reveals a finding of actual damage by Judge Lowell.

I cannot rule as a matter of law that the conclusions reached by Judge Lowell are erroneous, and a decree may be entered in favor of the plaintiff for $5,000 damages and $1,500 attorney's fee.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PRÆCIPE AND ANNEXED SUMMARY OF EVIDENCE FOR RECORD ON APPEAL—Filed February 14, 1934; approved February 15, 1934

To the Clerk of the above-named Court:

SIR: Please prepare a transcript of the record, pleadings, proceedings and papers in the above entitled cause to be transmitted to the United States Circuit Court of Appeals for the First Circuit in the matter of the appeal heretofore allowed and include in such transcript copies of the following papers and proceedings, to wit:

1. Bill of complaint by reference.
2. Answer of Post Publishing Company.
3. Paragraph No. 10 from Answer of Elijah William Cunningham, noting that the rest of the answer is identical with that of the Post Publishing Company.
4. Motion to dismiss.
5. Order of court thereon.
6. Memorandum by the court.

[fol. 17] 7. Defendants' motion for costs.

8. Order of court thereon.
9. Motion for leave to amend the bill with amended bill, but without exhibits.
10. Order of court thereon.
11. Transcript of the record of the proceedings and testimony of the witnesses before the court stated in simple and condensed form, omitting all parts not essential to the

decision of the questions presented by this appeal and as allowed by trial judge. See summary appended hereto.

12. Opinion of Brewster, J.
13. Final decree.
14. Assignment of errors.

Elder, Whitman, Weyburn & Crocker, Edmund A. Whitman, for Defendants.

February 15, 1934. Approved.

Elisha H. Brewster, United States District Judge.

In United States District Court

Summary of Proceedings and Evidence

At the hearing before the court November 10th the defendants admitted the validity of the copyright and its infringement. Counsel for the defendants called to the attention of the court the motions to dismiss in paragraphs No. 9 and No. 11 of the answers, whereupon the court said:

"Well, I will leave it in, Mr. Whitman, but I do not think you can possibly show any damage under it. Your motion is denied."

Whereupon counsel for the defendant said: "I would like to save my rights."

The plaintiff testified to his occupation as a newspaper editor and magazine writer and his experience as such; that the American Mercury gave him permission to join it as a party plaintiff; that he had written short stories and [fol. 18] had somewhere around ninety or one hundred published in well-known magazines; that during the three years that he was in the motion picture business he wrote almost thirty moving picture scenarios, and one of his stories was made into a picture; that he had also conducted columns in his own name in several metropolitan newspapers; that he had an assignment from the American Mercury of the article in question dated March 9, 1928; that the article was fiction and the infringing article was written as a news feature story happening in a period of time, but gathered by the writer through interviews; that one Harry Aitken had offered him fifteen hundred dollars a few months after the story had appeared for the motion pic-

ture rights—rights to produce it at any time he saw fit. The offer was not accepted. That he had had the story adapted for presentation upon the stage in November or December of 1928; that he paid four hundred and fifty dollars to have the adaptation done; that he had been offered publication of his story in a book of short stories by Alfred Knopf & Co., publishers, of 750 Fifth Avenue, a very short time after the story came out.

On cross-examination the witness testified he was with one motion picture concern from November, 1912, to September, 1914, as editor of a "Screen Weekly" and as production manager between 1914 and 1915, and with another picture concern in 1919 to January, 1921: that he had served with the British Army and the American Army.

In response to questions by the court witness stated that the story had never been put upon the stage. It would have been but for the depression. A Mr. Woods had an option upon it and held it for six months, then he went broke and could not do it. That it why the witness spent the money for having it adapted on the promise that Woods would produce it; that it had never been adapted for the movies because he had refused the offer of Mr. Aitken because he had been told at the time that if he put it on as a stage play he could get many times as much as was offered.

In response to a question by the court counsel for the plaintiff admitted that the defendant corporation acted innocently.

[fol. 19] The defendants called Edward J. Dunn, who testified he was city editor of the defendant corporation, was familiar with the story and that it had not been reproduced since it was first printed and there was no intention by the corporation to reproduce it; that it appeared in the Sunday edition comprising seventy pages, which included many other feature stories; that this edition was of the general makeup of Sunday papers of the Post.

In answer to questions by the court the witness stated that this was the only feature story which appeared on the front page; that they usually started three.

The defendant Cunningham testified that he was connected with the Post and read the story in question; that he

got the story in Dallas, Texas, sometime after the publication in the Mercury; that while there he visited a newspaper office where he had formerly been employed and there met a reporter formely associated with him in that office, who told him the main features of the story. The witness told him that if he would write out the story so that he could use it, he (the witness) would pay him twenty-five dollars; that later the story was so written out and the money paid.

On cross-examination the witness testified that this reporter's name was Abie Martin, who told him the incident happened in Oklahoma somewhere and it was something of which he knew; that later in Oklahoma City a woman and another were shown to the witness as the victims, but later he found he had been hoaxed. He did not remember her name, he made no effort to corroborate the story and never saw the tombstone described therein; that he could not produce any newspaper clippings giving features of the story, but could produce clippings showing a similar thing in Centralia, Washington; that he did not personally have such, but they could be found in newspaper files where an American Legion parade was shot into; that the defendant Post did not check up the truth and accuracy of his story; that he had been in the newspaper business since 1919.

In answer to a question by the court he said he had not seen the story in the Mercury.

[fol. 20] It was then agreed between counsel that of the Boston Sunday Post issue in question there were 384,834 copies on the following Sunday 380,277 copies and on the following 379,316, August 30, September 6 and 13, 1931.

During the argument for the plaintiff the court inquired whether counsel claimed there were any damages here, that he had shown any damages, to which counsel replied:

"I do not think we show any damages, your Honor, and we invoke the specific sections of the statute which provide for $1 for each infringing copy, and the amount of damages to be awarded by the Court."

In answer to the inquiry by the court what was a reasonable fee, counsel stated:

"I can candidly state, your Honor, that the time that has been spent upon this case exceeds 100 hours, and that

the ordinary compensation given, if it were charged on a purely time basis, would be in excess of $1,000. I do not say that we would charge in excess of $1,000. I do not say that the plaintiff would necessarily be charged that because, of course, as your Honor knows, we have to gauge fees by the ability of the plaintiff to pay, and other circumstances,"

that the 100 hours included services before having the first bill dismissed and as attorney's fee

"We suggest the sum of one—"

the reporter failing to catch the balance of the sentence.

At the conclusion of the arguments the court inquired of counsel for the respondents:

"You wish to suspend on the question of law?
"Mr. Whitman: I would, your Honor,"

whereupon the court said:

"Mr. Clerk, you may make the entry, '$5,000 plus $1,500 attorney's fee, to be suspended on the question of law to be argued later by the parties'.

[fol. 21] "Here your Post puts in as a matter of news something which it ought to know was not news, puts it on the front page of a paper which has 300,000 subscribers or buyers, and the plaintiff has shown that he refused $1,500. It is perfectly clear to me that the infringement was more than the statutory sum of $5,000. Therefore, I order the $5,000 and a $1,500 attorney's fee, plus costs, subject to the argument whether as a matter of law I have the right to award that full amount, or whether it must be shaded down or entirely cut down or entirely refused."

In United States District Court

Assignment of Errors—Filed January 9, 1934

Now come the defendants, Elijah William Cunningham and the Post Publishing Company and in support of their

appeal assert that this court erred in the following respects, to wit:

That the court erred:

1. In entering the decree;

2. In not allowing the motion to dismiss in paragraphs 9 and 11 of the defendants' answers;

3. In allowing the motion of the plaintiff to amend the bill;

4. In assessing damages in the sum of five thousand dollars;

5. That the court abused its discretion in entering the decree for damages in the sum of five thousand dollars;

6. In awarding the sum of fifteen hundred dollars as counsel fee;

7. That the court abused its discretion in awarding the sum of fifteen hundred dollars as counsel fee.

By their Attorney, Edmund A. Whitman.

RECITAL AS TO BOND ON APPEAL

Also on the ninth day of said January a bond on appeal for damages and costs in the sum of seven thousand dollars ($7,000) was filed by the defendants, the American Employer's Insurance Company acting as surety, and said bond was approved by the court on the tenth day of January, A. D. 1934.

[fol. 22] RECITAL AS TO CITATION AND SERVICE

A citation on appeal was issued on January 10, 1934, being made returnable in the United States Circuit Court of Appeals on February 9, 1934. Service of said citation was duly acknowledged by the attorney for the plaintiffs.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] In United States Circuit Court of Appeals for the First Circuit, October Term, 1933

No. 2903

Elijah William Cunningham and Post Publishing Company, Defendants-Appellants,

v.

William A. S. Douglas and The American Mercury, Inc., Plaintiffs-Appellees

Addendum to Transcript of Record of District Court Containing Narrative Testimony in Full of the Plaintiff W. A. S. Douglas and Defendant E. W. Cunningham— Filed April 9, 1934

Printed by Appellees

[fol. 24] Mr. William Archer Sholto Douglas, called as a witness on behalf of plaintiffs and being duly sworn, testified as follows:

Direct examination.

By Mr. Porter:

I am William Archer Sholto Douglas; forty eight years of age; and live in New York City. I am a newspaper editor and magazine writer. I am editor of the advance news sections of the Hearst's Sunday newspapers.

I am the W. A. S. Douglas who is one of the plaintiffs in this action.

The American Mercury gave me its permission to join it as a party plaintiff in the amended bill of complaint.

As to my previous experience—I have been a newspaper man since 1928, with the exception of some war service and two and one-half years in the motion picture business. During that time I have been on the staff of the Philadelphia North American, now defunct.

That is the first paper I worked on. I was night city editor of the New York Journal, I was reporter on the New York Herald, I was make-up editor of the Dallas News, I was managing editor of the Houston Post, I was

special correspondent with the Treaty of Versailles, I was at the Geneva conference of the Locarno Pact. I have been in Chicago for the last several years, about six years, as news representative there of the Baltimore Sun, the New York Herald Tribune, and the Boston Herald, the Literary Digest, and the London Daily Mail. I gave up those positions six weeks ago to enter the service of Mr. Hearst under a lengthy contract.

I have written a number of short stories and I have had probably something around 90 or 100 published. The stories have been published in America, in the American Mercury, Plain Talk, Book Man, Collier's, The Nation, the New Republic, Freeman, the New York Times Magazine, the New York Herald Tribune Magazine; and in England, in Britannia and Eve, which is the leading magazine there; and in Liberte and Parisien in Paris.

[fol. 25] The Court: I will say, Mr. Douglas, off the record now, or on the record if you want it, that I consider your story, the "Klu Klux," extremely well done. I was very much interested in reading it.

The Witness: Thank you, your Honor.

The Court: I am glad this case arose, so that my attention could be called to it.

The Witness: Thank you very much, sir.

The Witness: I have written motion picture scenarios. I was almost three years in the motion picture business as editor of the Pathe News and as production manager of the Pathe Company and of the Triangle Film Corporation. During that period of time, I wrote, I would imagine, almost 30 motion picture scenarios, the chief of which was "The Perils of Pauline" and "The Exploits of Elaine," with Pearl White; "The Rose of the Rancho" and "The Rose of the Border" with Betty Compson; and one of my Mercury stories, "Sandwiches and Sex Appeal," was bought by Colleen Moore and made into a picture.

I have written and conducted columns in several newspapers under my own name. In Chicago and in London as correspondent of the Sun I carried a column in London called "From a Fleet Street Window"; and in Chicago it was "The Chicago Parade." I also carried a column for a while about a year ago, just before the election, which was carried in the Boston Herald, which I worked for there, and also in the Sun and also in the Herald Tribune,

but I dropped that after three months because I had to travel around with Mr. Roosevelt, and I had not time to get it out in Chicago as I should have done, but Mr. Choate was very anxious that I should continue it (Mr. Choate is the managing editor of the Boston Herald), and also Mr. Wilcox of the Herald Tribune.

The Witness: My story "K-u Klux" was not based upon actual incidents, but is fictional. The only fact in the story is the fact that I was an oil well digger. I, the author—I wrote in the first person—was an oil well digger at the time that these incidents are supposed to have happened. [fol. 26] That is the only portion of the story that was left out of the Cunningham version. The Cunningham story as published in the Post is written as a news feature story, human interest story, without a spot news date line, as happening in a period of time but gathered by personal observation by Mr. Cunningham through interviews with these persons with whom he discussed the matter, presumably in Oklahoma City and these places like Old Man Trafton's and other imaginary places.

Mr. Harry Aitken offered me $1,500, a few months after the story had appeared, for the motion picture rights to it—the right to produce it at any time he saw fit. You have the letter there.

Mr. Aitken's offer was not accepted.

My story "K-u Klux" has been adapted for presentation upon the stage. The adaptation was made, I believe, in November or December of 1928. I paid $450 to have the adaptation done.

I have been offered publication of my story "K-u Klux" in a book of short stories by Alfred Knopf & Company, the publishers, of 750 Fifth Avenue. That was a very short time after that story came out, your Honor.

Cross-examination.

By Mr. Whitman:

In addition to the Pathe concerns that I was connected with, I was with the Triangle Motion Picture Company. I was with the Pathe Company from November, 1912, I think till September, 1914—in August, 1914 I was the editor of the Pathe News, that screen weekly. I was the production manager between 1913 and 1914. And then

I was with the Triangle Company from 1919 to the beginning of 1921; I think it was January, 1921.

X Q. 1. So that from 1913 to 1921 you were out of the literary newspaper business except so far as you were editor of a moving picture——

A. I was in the British Army from 1914 to 1915, and the American Army in 1918. I saw service with the British Army at the beginning of the War in 1914, August, [fol. 27] 1914, in France. I have also seen service in Africa and in Egypt and in India and in Hongkong. I was in the British Army from 1901 to 1907. I went in the British Army in 1901 as a drummer boy. I did not see military service in Mexico. I was a motion picture cameraman in Mexico.

X Q. 2. Yes. Don't you hold some sort of commission from the——

A. Oh, that is a silly thing. I think that President Obregon made me a major, an honorary major in the Mexican Army. In the late War I saw service in France, sir.

X Q. 3. And were you present in the capture of Port au Prince in Haiti?

A. I was in Port au Prince as a kid when I first came over to this country.

X Q. 4. And on the staff of General somebody or other?

A. That was a negro general. I was only there about three or four weeks. I met a man in London who suggested that I was—happened to serve in the British Army; I just got out of it at that time, and I planned to come to this country.

The Court: I am very glad to hear this, Mr. Whitman.

Mr. Porter: It is all very interesting, your Honor. Otherwise I would object.

The Court: I do not know whether it makes the plaintiff's case any better.

Mr. Whitman: Well, I was trying to bring out by that his wide experience and his ability to get extraordinary stories.

The Court: Very likely, but I do not know what it has to do with it. Shakespeare was not apparently a man of very wide experience when he first came to London; afterwards I suppose he gained some, but "The Merchant of Venice" would not have been any better or any worse if you could prove that Shakespeare had ever been in Venice. He never was, of course.

Mr. Whitman: My only purpose is to show his wide experiences all over the world where he might have picked up extraordinary stories, and this seems to be the one he picks upon as being his masterpiece.

[fol. 28] The Court: Has this story, this "K-u Klux," been put on the stage?

The Witness: No, sir. It would have been put on the stage but for the depression. Mr. Woods had an option on it; Al Woods held it for six months; then he went broke and couldn't do it. He promised that he would put it on. That is why I spent the money having it adapted, on Mr. Woods' promise that he would produce it.

The Court: Has it ever been adapted for the movies?

The Witness: No, sir, because I refused the motion picture offer of Mr. Aitken because Mr. Halperin and Mr. Woods told me at that time, if I put it on as a stage play, instead of getting $1,500 from Mr. Aitken, I could get many times that much. Mr. Halperin is the general manager of Variety.

Mr. Elijah William Cunningham, called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination.

By Mr. Whitman:

I am Elijah William Cunningham, and I am connected with the Boston Post. I wrote the story that appeared in the Post which is in question.

Well, I got the story in Dallas, Texas, I cannot be sure of the exact date, but some time after its publication in the Mercury. I was accustomed to going back to Dallas to visit my mother, who lived there and still lives there, and I once worked on the Dallas Morning News, and I used to go over to this particular office. Upon these trips I was supposed to get feature stories for the Post if and when possible, and this particular time I was in there looking back over the files of the K-u Klux Klan troubles and whippings and whatnot that I had covered down there when I was a reporter right after the War; and while I was looking over these files on this particular night, in came a man who had

worked on the News with me when we were both youngsters breaking in, who had drifted away and had become a sort [fol. 29] of itinerant newspaper man, a press agent for a circus and sundry other jobs—had gone completely to the bad, but was an old friend and a valued one; and he came in this particular night when I was looking through the files, and asked me what I was doing, and I told him.

He said, "If you are looking up the Klan stuff," he said, "there was a case up in Oklahoma of the Klan's taking a woman out and whipping her." And he went into great detail about the thing—apparently it was very vivid in his own mind—and he said it had been extensively written up, and he suggested that if I looked back through the files sufficiently, I might be able to find it. Well, I looked hard the next day and could not find anything about it, and the next night he came in again and asked me if I had found it, and I told him no, and he wanted to know—and I wanted to know—I asked him how well he knew the story himself, and he thought he could get ahold of it, and the thing was very hit and miss. I did not go into any great amount of detail. I did not know what the story was or care very much about it, but I wanted to do something for him if I possibly could, and I told him if he could get the story in such shape that I could use it, I would pay him $25, and I was thinking more of giving him the twenty-five than of getting the story at the time.

Well, he said he would try. He had a visit to make to his mother or something, and he would be back in about a week, and asked me if that would be time enough, and I said yes. So he finally came back a week or so later and gave me this story written out in eight or ten pages or what we call copy paper, and I gave him the money without asking him anything more about it, stuck the story in my grip, and on the way home I opened it and read it, and I was very greatly impressed with the drama of it.

Cross-examination.

By Mr. Porter:

The name of this newspaper man from whom I say I got this story was Martin. We called him Abie Martin. I do not know what his first name was; I do not think that was it. Mr. Martin did not tell me in what city in Oklahoma

[fol. 30] that story was supposed to have occurred. He merely said, "Up in Oklahoma somewhere." He had just come back from Oklahoma with his circus, as I understood it, and he had been touring up through there. He told it as something of which he knew.

X Q. 1. I understood you to say, from the correspondence—you can say it it not true if you will—that you met two of the victims of the flogging in a speakeasy or some such place in Oklahoma City sometime ago?

A. Later on in Oklahoma City two people were shown to me as being the victims, and I do not know who the other fellow was—a sheriff or somebody—and I later found it was a hoax pulled upon me—a hoax, a joke, a gag.

I do not remember the names of the two victims. I do not remember who they were—just a woman in the place.

I did not make any effort to corroborate this version of the story with anybody.

I never saw the tombstone inscribed to the Polish hero mentioned in my story.

I cannot produce any newspaper clippings of an actual event in which a foreign-born war hero shot up a K-u Klux parade with a machine-gun and was killed by the police as a result. But I can produce the clippings of a similar thing that that event was perhaps taken from; that was in Centralia, Washington, in some I. W. W. riots.

I cannot produce my clippings of the Centralia episode. I haven't any clippings, but the trouble out there can be found in any newspaper files, where some fellow mounted a machine-gun on a building and shot into a parade. I do not know whether he was a foreign-born war hero. It was not a K-u Klux parade he shot into. It was an American Legion parade, as I recall it.

The Court: Mr. Cunningham, had you read this story in the American Mercury?

The Witness: No, sir.

The Court: All right.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1933

No. 2903

ELIJAH WILLIAM CUNNINGHAM et al., Defendants, Appellants,

v.

WILLIAM A. S. DOUGLAS et al., Plaintiffs, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed August 9, 1934

WILSON, J.:

This is an appeal by the defendants from a decree against them in a copyright infringement suit. We shall refer to the parties as plaintiff and defendant, as they are described in the complaint. The only questions presented by the appeal are (1) whether the District Judge committed prejudicial error, after dismissing the original complaint, in allowing an amended bill to be filed bringing in an additional party plaintiff, and (2) whether the amounts awarded by the District Court for damages and costs: $5,000 for the former and $1,500 for the latter, are in either, or in both cases, so clearly excessive as to amount to an abuse of judicial discretion.

The copyrighted matter consisted of a short story under [fol. 32] the title, "Klu Klux," written by the plaintiff, Douglas. It was published in the American Mercury Magazine for March, 1928. The copyright relied on was taken out by the publisher of that magazine, American Mercury, Inc., covering its entire contents. Shortly after publication, the publisher of the magazine executed an assignment of the rights in the story, "Klu Klux," to the plaintiff, Douglas. The original complaint was brought by him alone. The defendant objected that Douglas could not maintain the suit, on the ground that a copyright is indivisible, and inasmuch as the copyright in question covered

the entire number of the magazine, it could not be split up, and therefore the attempted assignment to Douglas of the copyright in his story was ineffective to vest in him exclusive rights in the story in question, or to empower him to bring suit for infringement of the copyright. On motion to dismiss, the facts fully appearing on the face of the original bill, the District Judge sustained the defendant's contention and granted the motion to dismiss.

The plaintiff accepted this ruling and filed a motion to be allowed to file an amended bill, which was annexed to the motion, in which the American Mercury, Inc., was joined as co-plaintiff with Douglas, and reforming the allegations of the bill accordingly. A hearing was had on this motion, but from this point there was apparently some misunderstanding as to the nature of the motion. The order of the District Court was that the plaintiff be allowed to amend the bill. The defendant's third assignment of error is that the District Court erred "In allowing the plaintiff's motion to amend the bill."

Though the action of the District Court did not strictly follow the plaintiff's motion, both parties at the hearing were present in court. All further proceedings were on the new amended bill. The order of the District Court allowing it to be filed was on May 16, 1933. The final hearing on the amended bill was not had until November, 1933, and it was held without objection by the defendants, except [fol. 33] as to the power of the District Court to join another plaintiff by amendment. We think it was within the power of the sitting justice in equity to permit the amended bill to be filed, both parties being present in court. Equity Rule 37 provides that "any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause." As it does not appear that the defendants have suffered any prejudice thereby, they take nothing under the assignment of error.

Amounts awarded as damages, or allowed as counsel fees, in copyright cases, where no actual damage is shown, it is true, are within the discretionary powers of the court, except as limited by the Copyright Act, but any such award is subject to review when there has been a clear abuse of judicial discretion. "When invoked as a guide to judicial action it [judicial discretion] means a sound discretion, that is to say, a discretion exercised not arbitrarily or wil-

fully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green, 282 U. S. 531, 541.

As the considerations on which it rests are often of a rather subtle character and difficult to present in a printed record; and as there is a wide field for individual judgment and difference of opinion in such matters, the burden of showing that there has been an abuse of the discretionary power of the court may be a heavy burden on one seeking to show an abuse of that power; but when that burden is sustained, a judgment resting thereon will be revised on appeal. See Langnes v. Green, supra, at p. 541; Commonwealth v. Murphy, 282 Mass. 593, at 598; Newton v. Concolidated Gas Co., 259 U. S. 101 and 105.

The statute relating to damages in this class of cases (17 U. S. C. A., Sec. 25) (omitting such parts of this section as have no application to this case) provides:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (b) To pay to the copyright [fol. 34] proprietor * * * in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * (omitting certain specific exceptions) and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty * * *"

The amounts "hereinafter stated" are found in four subparagraphs under paragraph (b), of which the "second" provides that:

"In the case of any work enumerated in section 5 of this title, except a painting, statute, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

Section 5 of the Copyright Act includes both periodicals and newspapers.

However, not every infringment of a copyright by a publication in a newspaper, where no actual damages are shown, requires an award "in lieu of actual damages" of

the arbitrary amount stated in paragraph "second" under Sec. 25(b), viz: $1.00 for every infringing copy of the newspaper made or sold by or found in the possession of the publisher.

In the first place, if no actual damages are shown, unless the publication is after personal notice of the copyright, and except in the special cases enumerated under para. (b), the damages are limited to $5,000; and, secondly, while Congress has arbitrarily fixed $250 as the minimum damage that may be allowed in such cases, any judgment in excess of the minimum amount fixed by the statute must first, and in all cases, be "*just.*" (Italics supplied.)

The Supreme Court in interpreting this section of the statute in Westermann Co. v. Dispatch Co., 249 U. S. 100, 106, said:

"Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual [fol. 35] damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. *The statute says, first, that the damages are to be such as to the court shall appear to be just;* next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than $5,000 nor less than $250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,* but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling." (Italics supplied.)

In the present case the copyrighted story was published by the defendant company as an article of news with headlines on the front page of the Sunday edition of the news-

paper, the Boston Post. In the District Court the plaintiff's counsel agreed that it was published innocently by the defendant, the Post Publishing Co. The admission that it was published innocently by the principal also includes in effect an admission that Cunningham, the employee and agent of the Publishing Co. in gathering data for and writing special feature stories, had no knowledge that the story had been copyrighted. If the suit had been against the Publishing Co. alone, it could not have defended on the issue of damages on the ground that it had published the story ignorant of the fact that it had been copyrighted, if it was shown that Cunningham knew it was copyrighted matter.

Fletcher's Cyc. of Corp., Vol. IV, Sec. 2215; Suit v. Woodhall, 113 Mass. 391; Distilled Spirits, 11 Wall. 356; Curtis Co. v. United States, 262 U. S. 215, 222; Schneider v. Thompson, 58 Fed. (2d) 94, 96.

It may be urged that the admission in court should be construed only to cover the innocence in fact of the Pub- [fol. 36] lishing Co.; but the defendant Cunningham testified that he had never read the story published in the American Mercury Magazine; that the material facts were furnished him as an actual occurrence by a newspaper reporter who formerly worked with him on a newspaper in Dallas, Texas, and who received a certain charitable bounty therefor from Cunningham in return. There is no evidence in the case that Cunningham ever saw the story as printed in the magazine except the similarity of the subject matter, which is accounted for by the financial needs of the "down and out" reporter, Abe Martin by name, who furnished it to Cunningham. The only inference is that Martin pirated the facts from the story in the American Mercury Magazine, unless Cunningham deliberately committed perjury in court, and he, at least, is entitled to the presumption of innocence of this crime. Counsel for plaintiffs also admitted in open court that no actual damages were shown to have resulted to the plaintiffs.

The District Judge's award appears to have been based on the paragraph headed "second" of the statute above quoted. While the statute leaves much to the judgment or "discretion" of the trial judge, an award under it is made as compensation for pecuniary loss, not as a punishment. The plaintiffs undoubtedly have in law suffered

nominal damages by the infringement, and under the statute are entitled to the minimum sum named therein. Jewell-LaSalle Realty Co. v. Buck, 283 U. S. 202, 208. The provisions of the "second" paragraph under (b), even when actual damages are shown, but the amount is not susceptible of proof, merely permit justice to be done. They are not intended to open the door to punitive or arbitrary awards, having no relation to actual damages.

The award of $5,000 as damages in this case under "the circumstances of the infringement", as disclosed by the admissions of counsel and the uncontradicted evidence, is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

[fol. 37] Where no actual damages are proven or are shown to have resulted, there has been a clearly marked tendency by the courts to limit the award in lieu of actual damages to the minimum amount. See Insurance Press v. Ford Motor Co., 255 Fed. 896; Altman v. New Haven Union Co., 254 Fed. 113; Fisher, Inc. v. Dillingham, 298 Fed. 145; Sauer v. Detroit Times, 247 Fed. 687; Waterson et al. v. Tollefson, 253 Fed. 859; Cravens v. Retail Credit Men's Assn., 26 Fed. (2d) 833. Under the circumstances of this case, we think the maximum amount which could reasonably be awarded "in lieu of actual damages" should not exceed the minimum sum of $250 fixed in the statute, and that the decree of the District Court should be reversed in this particular.

As to counsel fees: The original suit was not justified. While the allowance for counsel fees should constitute a fair compensation for the professional work required, compensation for the work on the original bill, which was dismissed, should not be included, except in so far as it may have been essential as a preparation for the conduct of the case at the trial on the amended bill. Compensation of counsel in copyright cases, to be taxed as costs, is within the discretion of the court, yet if an amount allowed is so clearly unreasonable as to amount to an abuse of judicial discretion, it may be revised on appeal. In Marks v. Feist, Inc., 8 Fed. (2d) 460, an allowance of $1500 as counsel fees under this statute was reduced to $500. In Universal Film Mfg. Co. v. Copperman et al., 218 Fed. 577, Judge Hough sitting in the District Court made an allowance of $250, in a copyright case which was affirmed on appeal.

Each case, of course, depends on its own facts and no two will be precisely alike. The present case, at least, on the amended bill, involved no unusual difficulties or complications. The trial on the amended bill was brief. The infringement was admitted. Only the issue of damages and counsel fees were involved. It seems clear that the al- [fol. 38] lowance of $1500 as counsel fees was unreasonably excessive. We think they should not exceed $750.

The decree of the District Court is reversed as to the amount of damages and costs, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed Aug. 9, 1934

BINGHAM, J. (dissenting):

The original bill filed in this case August 2, 1932, was heard on defendants' motion to dismiss April 10, 1933, and the motion was granted April 14, 1933. Thereafter, on April 18, 1933, the plaintiff filed a motion "for leave to file an amended bill of complaint, amended by adding the American Mercury, Inc., as a party plaintiff, and in other respects," attaching thereto the present so-called amended bill. On May 16, 1933, after hearing, an order was entered allowing the plaintiff's motion, and the so-called amended bill having been filed, on November 10, 1933, the parties were heard by the court "on the pleadings and evidence." Upon completion of the hearing the matter was taken under advisement and the case continued until the December term, 1933, when, on December 14, 1933, the court announced that a decree would be entered in favor of the plaintiffs. January 2, 1934, a decree was entered in favor of the plaintiffs—that they recover of the defendants "in lieu of actual damages or profits, the sum of five thousand dollars ($5,000), and in addition a reasonable attorney's fee of fifteen hundred dollars ($1500)."

It is from that decree that the defendants prosecute this appeal. In their assignments of error they complain among other things that the court erred (1) in allowing the motion of the plaintiff to amend the bill; (2) in assessing

damages in the sum of $5,000; (3) that it abused its discretion in awarding damages in the sum of $5,000; (4) that it erred in awarding the sum of $1,500 as a counsel fee; and (5) that it abused its discretion in awarding the sum of $1,500 as a counsel fee.

I agree that the defendants take nothing by their first assignment of error. It is apparently based upon a misconception of the plaintiff's motion. That motion was not [fol. 39] to amend the bill, but for leave to file an amended or new bill. The original bill had been dismissed and, having been dismissed, there was nothing in court by which to amend. The motion for leave to file an amended or new bill having been granted and the bill filed, and the parties having appeared in court and been fully heard thereon, the defendants cannot now complain because they may have misunderstood the plaintiff's motion.

The second assignment of error is evidently based upon the idea that the court was without authority to assess damages in the sum of $5,000 or any other sum, no actual damages having been shown. In the prayer of the bill the plaintiffs asked for actual damages or, in the alternative, "in lieu of actual damages or profits, such damages as to this court shall appear to be just and proper within the provisions of the act of Congress in such cases made and provided," and, it being conceded at the trial that no actual damages were shown, the damages awarded were in lieu of actual damages and profits under Sec. 25, Title 17, of the U. S. C. A. The question raised by this assignment of error, therefore, is whether, in the absence of proof of actual damages, the court was authorized to make an award, in lieu of actual damages and profits, under Sec. 25 of the Copyright Act. That section in part provides:

"§ 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * * *

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such

damages the court may, in its discretion, allow the amounts as hereinafter stated, but [here follow certain specific cases not here involved], and such damages shall in no other case exceed the sum of $5,000 nor be less than $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the [fol. 40] limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him."

Then follows the so-called schedule of cases in which damages may be awarded and stating the terms and manner of arriving at the damages awarded, of which the second item is:

"Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees."

The plaintiffs' work was one enumerated in Section 5. And it appeared in evidence that the defendants, in getting out their edition of the Boston Sunday Post of August 30, 1931, made 384,834 infringing copies of the plaintiffs' work, which they sold. And at the trial the defendants admitted that the plaintiffs' work was duly copyrighted, that the copyright was owned by the plaintiffs, and that they had infringed it; and the plaintiffs admitted that they had shown no actual damage.

There can be no question that, inasmuch as there was no proof of actual damage, the court was authorized to assess damages, in lieu of actual damages, under and in accordance with the provisions of the statute applicable to a work of the character of the plaintiffs and infringed in the manner above specified; and the only question remaining upon this branch of the case is whether the trial court, in awarding damages in the sum of five thousand dollars, abused its discretion.

As there was but a single infringement of the plaintiffs' work (Westermann v. Dispatch Printing Co., 249 U. S. 100), the court, under the statute, was required to assess a sum not less than $250; and, such sum being fixed by Congress in the statute, it is to be presumed to be just

within the meaning of the act; and subdivision second specifically provides that in the case of a work such as that of the plaintiffs the court may award "$1 for every infringing copy made or sold by or found in the possession [fol. 41] of the infringer or his agents or employees," limited, as specified in (b), not to "exceed the sum of $5,000." If the sum of $250, which the statute prescribes shall be awarded for an infringement consisting of the making of a single copy, is just within the meainng of Section 25(b), then, on proof showing the making of additional infringing copies up to 5,000 or over, an award of $5,000, as fixed by the statute, is likewise to be regarded as just within its meaning. Under the statute, had the infringement consisted in the making of a single copy or of 250 copies the plaintiffs would have been entitled to only $250 as a just award. But on its appearing that the defendants made 384,834 infringing copies instead of one or 250, the question is: Whether the District Judge can be said to have abused his discretion by following the terms of the statute and awarding a dollar a copy for at least 5,000 copies of the total number of infringing copies made and sold. To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5,000, abused his discretion, would be a travesty on the law and in effect to read out of the statute the provisions of Section 25(b) and subdivision second, authorizing an award of "$1 for every infringing copy made or sold" up to $5,000.

In my opinion the award of the trial court was authorized and not an absue of discretion. An award of damages within the statutory limits cannot be an abuse of discretion in the case of an infringement and sale of infringing copies of the nature and number here shown, and I fail to see wherein this construction of the act, as applied to the circumstances of this case, conflicts or is not in accord with what was held in the two cases decided by the Supreme Court (Westermann v. Dispatch Printing Co., supra; Jewell-LaSalle Realty Co., v. Buck, 283 U. S. 202) construing this act.

Now as to the attorney's fee. Section 40 of the Copyright Act authorizes the court in its discretion to award a reasonable attorney's fee. The court in this instance [fol. 42] awarded $1,500. The evidence shows that the services rendered for which this award was made covered

at least one hundred hours, a substantial portion of which was devoted to the preparatoin and hearing of the original bill, which was dismissed. The question considered at the hearing on the motion to dismiss the original bill related solely to whether William A. S. Douglas, the sole plaintiff in that bill (could maintain the suit, for it appeared in the bill that the plaintiff's work or story was published by The American Mercury, Inc., in its magazine or periodical called The American Mercury, together with other matters, and that the copyright was obtained by The American Mercury, Inc., on an edition of the magazine as a whole. The question was whether, under such circumstances and it appearing that The American Mercury, Inc. had given to Douglas what purported to be an assignment of the copyright to the extent that it covered his work, this was sufficient to enable him to maintain the suit. Some of the legal services rendered concerned that question and undoubtedly had to do with other things arising under the original bill. These services, although they in no way concerned the present suit, were taken into consideration in awarding the attorney's fee of $1,500. This manifestly was not authorized and was an abuse of power, but, as the record stands, I do not see how this court can determine what amount can be justly awarded as an attorney's fee, as the court in this case has done.

As to this, it seems to me the case should be remanded to the District Court for determination of the amount and that no sum should be awarded based on services not necessary to the preparation and trial of the action under the present bill.

[fols. 43-46] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF HEARING

On April 19 and 20, 1934, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the ninth day of August, A. D. 1934, the opinion of the court (page 31) and a dissenting opinion by Bingham, J. (page 38) were filed, and the following Final Decree was entered:

In United States Circuit Court of Appeals

Final Decree—August 9, 1934

This cause came on to be heard April 19 and 20, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, August 9, 1934, here ordered, adjudged and decree as follows: The decree of the District Court is reversed as to the amount of damages and costs, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellants recover costs in this court.

By the Court.

Arthur I. Charron, Clerk.

Recital re Issuance of Mandate

Thereafter, to wit, on September 26, 1934, mandate issued to the District Court.

Clerk's Certificate to foregoing transcript omitted in printing.

1 Exhibit 41

The AMERICAN MERCURY

VOLUME XIII March 1928 NUMBER 51

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Published monthly at 50 cents a copy. Annual subscription, $5.00; Canadian subscription, $5.50; foreign subscription, $6.00; all rag edition, $10.00 by the year. The American Mercury, Inc., publishers. Publication office, Federal and 19th streets, Camden, N. J. Editorial and general offices, 730 Fifth avenue, New York. London office, 37 Bedford Square, London W. C. 1, England. . . . Printed in the United States
Copyright, 1928, by The American Mercury, Inc. . .
Entered as second class matter January 4, 1924, at the post office at Camden, N. J., under the Act of March 3, 1879. Published monthly on the 25th of the month preceding the date. Five weeks' advance notice required for change of subscribers' addresses.

Alfred A. Knopf, *Publisher*
H. L. Mencken, *Editor*
George Jean Nathan, *Contributing Editor*

KU KLUX

BY W. A. S. DOUGLAS

I HAD hunted oil in that little Oklahoma town several years before and made some friends among its people. I drilled two dry holes there, and then quit. Passing through again a while ago on my way to Dallas, I stopped off for a few hours for the purpose of drinking some Choctaw beer, a sweet, sour, potent beverage which all the might and power of the Anti-Saloon League has failed to stop Lo from brewing, drinking and selling.

I headed for a joint where I felt sure of a hearty welcome. It was still run by Lizzie Gritts, a corpulent, smiling old Creek tribeswoman, black as the blackest Ethiopian, and, I should say, about as pure-bred a Negro as the late Booker T. Washington. But Lizzie was officially an Indian, with all the privileges pertaining to that status, for the Creeks had given her ancestors sanctuary back in slavery days, adopting them into the tribe and mixing the breeds. Lizzie must have been a throw-back to the pure African strain, for there were no signs of a Creek about her. Even her speech was Aframerican.

I drank two bottles of her beer, and waited to talk of old times until two Katy freight trains, going in opposite directions, had stopped bowing and scraping to each other on the tracks outside her open front door. Gradually there came quiet and we grew reminiscent over the oil boom that had turned this settlement into a noisy city for a few months and then reduced it over-night into a deserted village. I wanted to know particularly about the death of Adam Kapechik, a big blond Polak who used to mend my boots and those of the other drillers.

"I read in the papers," I told her, "that he went crazy at a Fourth of July parade and started shooting at the marchers. And then when the sheriff went after him he fought back and they had to kill him. I heard he had shell-shock when he was in the marines. Must have hit him again, sudden-like."

Lizzie was gurgling a bottle of beer. She put it down on the table and stared at me a moment, her eyes almost popping out of her honest old black hide.

"Is you-all Ku Klux?" she demanded. "I asks you is you-all Ku Klux?"

"Not by a damn sight," I hastened to reply. "In the first place, I'm ineligible—born in the Old Country and therefore not a 100% American. Second place, I'm agin 'em."

Lizzie took another long slug, put down the bottle, wiped her mouth with the back of her hand, scrutinized me for a full minute, and spoke again.

"Ku Klux got dat boy Adam," she said and stopped short.

"Why, I heard they put up a monument to him," I answered in wonderment. "He was the war-hero of this man's town, and I understood they just figured he went out of his head when he did the killing."

Lizzie was at the ice-box now, pulling the caps off two more cold bottles.

"Dat's what de papers said," she replied as she came forward with a flagon in either fist. "De gemman what sent out de word from here he's a Ku Klux and de boys all had him fix it dat way. Nobody never comes around here t'argue 'bout it. Don'no as I should be a-telling you-all."

I kept her running back and forth from

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I kept her running back and forth from

the ice-box to the table until I had her thoroughly oiled and very talkative. Before I left she had given me the tale.

Next morning, before the Dallas train was due to leave, I dropped round to the cemetery. I halted at last before a big granite shaft which bore the following inscription:

> Sacred to the Memory of Adam Kapechik,
> Late Private, United States Marine Corps.
> Born in Poland, August 19th, 1894.
> Died in this City, July 4th, 1924.
>
> He fought as a volunteer in the army of his adopted country during the World War and was severely wounded in the engagement with the enemy at Chateau Thierry. He was twice decorated for individual heroism.
>
> The effect of his injuries was such that his mind gave way during the progress of a patriotic parade. He fired a machine-gun into the midst of the marchers, killing two of his fellow citizens. He was himself unavoidably slain while attempts were being made to overcome him.
>
> Realizing that he was unaware of what he did, this monument has been erected by popular subscription of his neighbors. Among the donors were the families which were bereaved by his act of madness.
>
> May His Soul Rest in Peace

At the foot of the inscription, and set in the stone behind a piece of plate-glass, were the four medals which Adam Kapechik had won in the war.

Lizzie Gritts had told me to look up Round Heels for corroboration and further details of the story. I did not get to the Smackover oil-fields until several weeks later, but I found Round Heels the first night in Joe Yancey's dance-hall.

She had certainly developed into a tough baby—soured, dopy, drink-sodden and looking forty instead of what she was, around twenty-two. You will know how hard she had become when I tell you she charged me five dollars to take a look at the thong marks on her back. In the old days she had been just a sweet, easy little kid, a bit too generous with her favors—which accounts for the name they gave her.

Anyway, she checked up Lizzie's story and gave me a lot more details, buttered in among curses and dragged out of her with slugs of Joe Yancey's corn liquor. Between her and the old black Creek I got what I am now setting down.

II

Adam Kapechik had wormed his way out of Warsaw and managed to make the safety of Copenhagen without being picked up by the patrols hunting more cannon-fodder. Not that Adam was any sort of a coward. But he was trying to get to the pot of gold at the end of the rainbow which he knew as the United States, and no war was going to stop him.

However, he landed in New York just in time to see the pot of gold, so to speak, take up arms itself. Adam, wandering around the streets, fell in love with the red stripes on a marine sergeant's pants and got into talk with the wearer. Before he knew what had happened to him he was a marine himself and was picking up the rudiments of "To the rear, march!" on the Quantico parade-ground.

He learned to be a marine quicker than he got hold of the English language, but as that did not hinder his fighting qualifications he went across with the first replacements and in due time became an excellent machine-gunner. While it is true that he was hit on the shoulder by a chunk of shrapnel, there is no proof that he was ever marked up for anything more than an average dose of first-contact shell-shock. Certainly not enough to set him off berserk, as the inscription on his tombstone was to say later on.

Adam got his discharge in 1920, and, having saved up a few dollars and won American citizenship by virtue of his war service, he cast around for a spot to light on. His hunt ended in the little Oklahoma oil-town where he is buried today. Being a shoemaker by trade, he opened up a little workshop, and soon he was doing as well as the next fellow.

Most everybody liked him. He was a big blond, smiling boy with a kind word or a joke in his broken English for everyone who came around. A crowd of the boys who had been in the war started to make a hang-out of his little store. He put in a shine-stand and a case of cigars and

cigarettes. He had everything he wanted now but a girl. Judged by Oklahoma standards he was dumb, what with his Old World ways. The fact didn't set him in so good with the flappers.

The Ku Klux Klan and Adam both got to going good about the same time in that neck of the woods. The local klavern was started off by a professional plugger who liked the lay-out down there so well that he decided to stick. He made the town his headquarters and worked all over the State, so that he came to be a high muck-a-muck, big enough to challenge the gang down in Atlanta and get away with it—for a while. Women and booze were his meat and they nabbed him in the end with a combination of both. He's doing a long stretch for murder right now.

Faulkner, his name was. A short, scrubby, little man, all puffed up like a pouter pigeon. Acted decent enough till he got his hooks into the county and State political machinery. From then on he was hard-boiled. He got away with so much that he figured no thing or person could stop him. He has been made aware of his error since then.

Right off the line he sold himself to Dr. Dody, the Baptist minister. The boys who hung around Adam's shoe shop used to call the doctor Old Horse Teeth. He was a tall, skinny man with long arms and bent legs like one of those big wicked monkeys. He had a greasy grin for the women, especially the young ones.

Well, the parson gathered in a lot of his church folks for the Klan organizer—it was whispered they split the commissions—and first thing you knew he had all the bankers and the storekeepers. This made old Narcissus Harper, the Methodist preacher, sorer than Hell. But Faulkner soft-soaped him and got him to ride along by giving him an office. Cyclops or something like that.

Inside of a month all the big bugs in town had their nightshirts and pillow cases and were sneaking once a week into what used to be the Odd Fellows' Hall, but what was now a full-fledged klavern, with a fiery cross blazing on the roof every night in red electric lights.

At the go-off the young fellows laid away from it. They had lots of fun watching the monthly parade from their usual hang-out at Adam's store. They used to play a game of picking out the Koo-Koos by their walk. Adam himself didn't depend on the strut. He could recognize the shoes he had cobbled, and always beat the rest of the gang in guessing.

The Klan would swing along Main street every fourth Friday night. The band was only four men at the start, but it made noise aplenty. Faulkner would be in the lead, all robed in white and gold and red, and riding Jess Mackintosh's old white mare, the one with a touch of the blind staggers.

"There's Fatty McGahan, the Ford dealer," one of the boys would shout from Adam's doorstep. "Hey, Fatty, pull in your belly, you can't fool me!"

Of course you couldn't see Fatty's face through the pillow slip, but you just knew he was madder than all Hell.

"And look at Limpy Squires dragging his nighty in the mud! Hey, Limpy, God help you when you climb into bed to-night with all that muck on your tails!"

There were certain ones they would make fun of and there were others they'd be careful about, such as old Horse Teeth and Jeremiah Slades, the banker. They knew better than to make any wise cracks about those two. They did poke fun at the Rev. Narcissus Harper, who was knock-kneed and could be spotted a mile away, but they stopped picking on him when young John Hawley's dad ran him out of town at the preacher's complaint. Old Hawley was in the Klan and he told the boy he was through with him and to go jump a freight train. The boy beat it and his mother died inside of three months. There were folks around that blamed her passing on the Klan.

The whole thing was a jumble to Adam Kapechik. You see, he still wasn't any-

thing more than a greenhorn. He even wanted to join up when Joe the dairyman went in, and you could have knocked him down with a toothpick when they told him he could never be a hundred-per-center as long as he did not possess an American birth certificate.

From its being a laughing stock, this klavern got to be something that even the young fellows were scared of. The first straight tip they got to quit kidding the organization came when Faulkner and the Rev. Mr. Dody raided Panhandle Jessie's joint down on the Katy tracks, a few doors below Lizzie Gritts' place.

Jessie had the habit of going a bit further than Lizzie in that she had some young girls around as well as some cases of Choctaw beer and a jug of corn. Faulkner and Dody came busting in there one Saturday night when the piano was going and there was a bit of dancing. There were about thirty who broke the door, all in nighties. They caught five of the gang that made Adam's store their hang-out and they gave each of them three cracks with a leather whip right out there on the railroad tracks.

Then they loaded Jessie and three girls into a car and put them on the three o'clock morning train for Oklahoma City. Warned them not to come back for their duds, either. All they started them off in was the flimsies they were wearing in the house. Dead of Winter too.

Bit by bit it got to be nosed around that the only way for a fellow to guarantee himself a good time without getting in jams was to join the Klan. It was common talk that Faulkner himself would chase a skirt twenty miles barefoot on the chance of a date. He'd been seen in Oklahoma City more than once with some fast looking babies. He wouldn't have dared do this at the start but he'd got so now that he was pretty near bossing the State. Talking of running for Congress, too.

There came a handful of other raids with more whippings of young fellows, and girls put on a rail, near naked, and run down to the three o'clock Katy speeder for the West. And every time it would happen there would follow a big recruiting for the Klan. It came so that about six months after Faulkner had blown into town the only guys who didn't belong were Adam the Polak, five Jew storekeepers, nineteen Roman Catholics, the Red Indians who wore blankets or sold beer, and the Negroes.

However, it didn't bother Adam much, even if they wouldn't let him in. The gang still hung around his store, but, being Klansmen now, they wouldn't be around on parade nights to kid the marchers. Instead they would be tramping along behind Faulkner and the old white mare with the staggers. But they didn't mend their ways any. Instead, they got worse, for they figured they were now safe. Jessie even came back to town and set up again after one of the boys who had got whipped over her told her he was a Kluxer now and she could go the limit. So she brought nine girls with her instead of three. Faulkner took a shine to one of the new babies and they said he was a regular customer now.

III

I spoke earlier in this yarn about Adam liking the girls. In a decent way, of course. The boy was clean, and he never had any part in the rough talk that went around his place sometimes at night. He just didn't get it. But he was lonely, and pretty nearly any girl who would have made up to him could have got a right fine fellow for a husband, and all this trouble that is going to be set down here would never have happened.

He did have his eye on one, but he couldn't make much headway with her. This was the kid the boys called Round Heels—behind her back, of course. At the time these things were happening she was about eighteen years old and as pretty as they make them. A little blonde with a smile for everybody. She had no folks

in town, having blown in from the country, over by the Arkansas border. She worked in a notions store and when her day's stint was done she had nothing on her mind or in her eye but a good time with the boys.

She got herself a bad name right away. I guess she deserved it according to the letter of the law, though not according to the teachings of the Man whose representative hereabouts was old Horse Teeth Dody. She was easy. Thousands like her all over the world, doing no harm to anybody but themselves.

The boys had passed the news around. They talked about it in Adam's store, but he never got it quite clear. He saw the other lads dating her up, and at last he mustered the courage to try it out himself. She turned him down but was nice about it. The kid was all puffed up with her popularity and couldn't tell the difference between an honest-to-God man and a lot of chippy-chasers. Adam was just a dumb Polak to her.

He never had the nerve to try again, but he would look at her calf-eyed when she came in to have her shoes shined or fixed. One time he did get something of the drift of a crack that was made about her and flattened the boy who was talking with one left-handed swing. Kept his foot on the lad's neck till he took it back, every word.

Judging by the way things came out afterward he must have been crazy over Round Heels. You see, he was just a tight-mouthed Old Country boy, dumb, and not here long enough to know how to wise-crack the girls.

Faulkner got his eyes on her at last. It happened one evening when she was coming home from work. He ran his car alongside of her for about five blocks, trying to strike up. Now, she could be picked easy enough, but as I said before, she was desired by all the good-looking kids around her own age, was a snappy looking baby and was still choosing, even though they had given her a bad name.

Anyhow, she ritzed Faulkner. And that wasn't the half of it. She told the story over at the drug-store that night and a guy who overheard it carried it right back to the Klansman.

"Who does he think he is, the little pot-bellied shrimp?" she squealed over the top of her banana-split. "A dirty little old man trying to chase girls young enough to be his daughters! I don't care if he was the Imperial Wizard himself—I'll teach him to be fresh with me! The way I told him off he'll not bother me again."

Faulkner just burned up when they carried this back to him. He was about as mean as a rattlesnake and he knew something already about Round Heels chasing around. Anyhow, that night and for many nights afterward, he had her trailed, and I guess he got her to rights more than once. She had a special sweetie, Johnny Sakheimer, whose father kept a gents' furnishing place on the main street. They were Jews, but in spite of the Klan having the town by the ears Johnny was about as popular a kid as there was around. He played a bit, sure enough, but wasn't any worse than the others. But he was a Jew and that fitted in with Faulkner's plans to stir up the boys in the nightgowns.

Faulkner had lined up things so good while he was trailing the two that he had the trysting place and the time all spotted and mapped out. So about ten o'clock on a Summer's night about forty picked Klansmen, robed and all, closed in around Johnny's coupé where it was sitting under a tree on a country road and pulled therefrom the boy and the girl.

What happened after that I'll set down in Round Heels' own words as she told me the story in Joe Yancey's dance-hall in Smackover. As I said before, I had given her five dollars to let me see the scars on her back, and after drinking nearly a quart of corn liquor she spilled the yarn just about as old Lizzie Gritts had outlined it to me.

"So help me, God, all we were doing

was sitting there and loving up a little. Nothing wrong. I'm not saying I'd been what you call a good girl before this happened, but that night we weren't doing a damn thing but kissing and hugging. We were crazy about each other at that time.

"The first thing I knew all these guys in white robes rose around us. I was scared to death. I squealed holy murder. They threw open the doors and a big fellow grabbed me. I think it was Parson Dody, but I couldn't swear to it. He stuffed a handkerchief down my throat. I kicked so hard it took five of them to drag me into a big car. Johnny was fighting like Hell behind me. I heard them calling him a dirty Jew.

"'You will lay around with our women and make them prostitutes,' I heard someone shout, and then they must have landed on him hard, for he was still. They loaded him into another car behind us and started off.

"A fellow took the handkerchief out of my mouth and I started to holler again. So they put it back and tied another one across my face so I couldn't spit it out. There were a dozen of them in the car and they had their hands all over me in the dark. Laughing while they were doing it.

"They drove us out about five miles to a little hollow with fir trees around it. Then they dragged me out and laid me on the grass. Did I tell you they had tied my feet and hands with handkerchiefs? Well, they did.

"They tumbled Johnny out. He was still dazed from that wallop. They pulled off his coat and shirt and tore his underwear from him so he was stripped from his trousers up.

"They tied him up to a tree with his hands over his head. And they put a rope round his knees to keep them close to the trunk. Then they made a circle round him with me just inside of it, lying on the ground.

"A guy stepped out from the bunch with a whip. Just a short mule-wagon whip. He beat Johnny about five times over the back before he let out a holler. Then he gave him about fifteen more, with the kid yelling his head off. He was all blood when the bird that was whipping him laid off. But he stopped hollering when they let him loose. Just dropped to the ground, moaning.

"They pulled him out of the way. Now it was my turn. I was fighting like a wildcat. Scared stiff but game, if I say it myself. They got me over to the tree and hitched up my hands by a rope to a branch over my head. Then they tied my knees like they tied Johnny's. I still had all my clothes on.

"The big guy, I am sure it was Parson Dody, came up and cut my dress from me with a knife. I had knickers and a shimmy on below. Most times I don't wear the knickers and I might just as well not have this night for all the good they did me. Then they backed away. I was waiting for the whip.

"'Pull off her shimmy!' someone hollered. And half a dozen others yelled out the same thing.

"'Pull off her shimmy!'

"I felt a hand on me and then a yank. It was torn right from me. But still they weren't satisfied.

"'Strip her!' yelled two-or three-more of them.

"The fellow behind me just took my knickers by the elastic and pulled them down so they were round my knees. I was naked from there up.

"And then they laid that lash on me! God in Heaven! Ten times that I counted! I think they stopped at that, but I couldn't swear to it. I don't know another thing about it till I came to, laying on my face in Lizzie Gritts' parlor. She was pouring corn liquor on the cuts and Adam Kapechik was standing beside her."

That was Round Heels' story. As she finished it, sitting in that cubicle in a Smackover dance-hall, she opened her waist, pulled it to one side and showed

me her right breast. The nipple was split clean in half.

"I'll throw in that exhibit without any extra charge," she said. "That's where the end of the lash came around and caught me."

IV

It was Adam Kapechik who found Round Heels lying by the roadside in her shoes, stockings and knickers and with her torn dress thrown across her shoulders, stuck there by the blood on her back. It was his habit to take a walk before going to bed and chance sent him in that direction. The Klansmen had dumped her out inside the city limits the same as they had done for Johnny Sakheimer. Johnny managed to get home some way and a week later his whole family left town. On orders, it was whispered.

Adam carried Round Heels the mile and a half to Lizzie Gritts' house. Lizzie was a good friend of his. The only dissipation he went in for was drinking her beer. He stayed there all night watching old Lizzie, who doctored the kid's back with corn liquor to clean it and chicken-fat to heal it.

In the morning he lit out. This was the third of July and the Klan was to have the biggest parade of its history in this town on the Fourth. Three big bands, a full gathering of all the hooded hosts in the county, the Civil War men, the Legion boys, and the boy scouts.

The way things happened, Adam must have been completely out of his mind—but like many maniacs he went about things systematically. First he drove his flivver to Oklahoma City. He belonged to the National Guard and got into the armory without any trouble. He came out the back way with two or three packages and loaded them into his car. He had swiped an old machine-gun, pretty well shot. And one of the packages was a hundred rounds of ammunition. Also, he took his rifle and bayonet out of the company rack.

He must have hid the artillery in his shoe-shop overnight, for afterwards people told of his carrying bundles to the roof of the McMaster Building at the top of Main street. They said this was about noon on the Fourth. Nobody paid much attention, thinking he was doing some work for the store.

All the night of the third he sat beside Round Heels, who was lying on a bed in Lizzie Gritts' parlor. Another sure proof that he was crazy was that after petting her all night—just with words—he asked her to marry him and told her they would go off to some other town if she would. The kid agreed, though she probably didn't know what she was saying—being in a fever and all. He told her he would come back with a minister "after the war," so you can see he was clean off his base.

The big parade was to start at three o'clock. The route was up Main street from First, past the reviewing stand at Eighth and on to Fifteenth and Spruce, where they were to disband. The McMaster Building was at the corner of Sixth and Main. A big Klansman from Atlanta was to review the marchers, and Faulkner was to be in the stand beside him with a lot of other high muck-a-mucks. Lucky for that boy he *was* in the stand.

They came swinging uptown out of First street about a quarter past three. Everybody in town had turned out except poor little Round Heels and Lizzie Gritts, who was nursing her. On the coping of the McMaster Building were stuck two American flags. Nobody thought to look closely between them. If they had they might have caught the glint from the nozzle of a machine-gun. Behind it was crouched Adam Kapechik, crazy as a March hare, wearing his overseas uniform, his war medals and a full pack. Beside him lay his rifle and bayonet. What he figured was that he was back in the trenches sure enough.

The Klan was leading the procession and the band ahead of it was playing the

"Klexology." All the boys were singing it out loud. The tune is "America" and these are the words:

God of Eternity,
Guide, guard our great country,
Our homes and store.
Keep our great State to Thee,
Its people right and free,
In us Thy glory be
Forevermore.

Crazy Adam got his gun into action at about a hundred yards. Picked off two at the first crack. The Rev. Narcissus Harper through the forehead, and John Hughes, the butcher, through the stomach. Then something happened that saved the entire klavern of Klansmen from annihilation. The old machine-gun jammed.

Sheriff John Kruger, a man you have to hand it to for guts, whipped off his nightie and pillow-case and tore up the fire escape of the McMaster Building while the mob was ducking for cover and Butcher Hughes was kicking up his heels in the road.

Two cops followed Kruger with their revolvers out. Adam had given up hope of getting the machine-gun to work again and had taken to his rifle. He was nestling the butt into his shoulder and drawing a bead on the panicky mob below when Kruger came bounding off the fire-escape.

Adam turned just a fraction of a second too late. The sheriff caught him on the swing and drilled him clean through the side of the head. He never knew he had been hit.

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MISSING
PAGES
46-48

54] Clerk's Certificate to foregoing exhibits omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,147. U. S. Circuit Court of Appeals, First Circuit. Term No. 519. William A. S. Douglas and The American Mercury, Inc., Petitioners, vs. Elijah William Cunningham and Post Publishing Company. Petition for a writ of certiorari and exhibit thereto. Filed November 7, 1934. File No. 519, O. T. 1934.

(5735-C)